SUPREME COURT, U.S.
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No. 02-816

IN THE

Supreme Court of the United States

ROLAND J. SADOUX,

Petitioner,

v.

JAMES H. WESTMORELAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an agent of the signatory to an agreement, which contains an arbitration provision, can compel the arbitration of claims brought against him in his non-representative, individual capacity when the signatories did not show any intention in the agreement to allow the agent to compel arbitration, when the claims that are brought against the agent are not based on the agreement, and when the Plaintiff is not seeking to enforce any provision of the agreement.

PARTIES TO THE PROCEEDING

Petitioner, Defendant-Appellee in the courts below, is Roland J. Sadoux ("Sadoux").

Respondent, Plaintiff-Appellant in the courts below, is James H. Westmoreland ("Westmoreland").

Jan Hendrickx ("Hendrickx") is also a named Defendant in the District Court proceeding. He was not, however, a party to the Fifth Circuit Appeal nor is he a party to this Appeal.

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STATEMENT OF THE CASE

In 1996, Aston Holdings Limited A.V.V. ("Aston"), an Aruba corporation, was formed for the purpose of acquiring and performing a contract that provided for the collection and transportation of garbage/waste within Santo Domingo, the Capital of the Dominican Republic, by Dixi Sanitary Services. Petitioner's Appendix at 2. ("Pet. App."). Following its incorporation, the shares of Aston were held as follows: T.D.C. Trade Development Company A.V.V. ("TDC"), (owned by Defendant Hendrickx), owned 45%; Pentrade Limited ("Pentrade"), (owned by Defendant Sadoux), owned 45%; Westmoreland owned 7%; and Angel Action Holding N.V. ("Angel") owned 3%. *Id.* In late December 1996, a Shareholders Agreement was entered into between the shareholders, defining their rights and obligations with regard to their ownership of Aston ("Agreement"). Pet. App. at 33. The Shareholders Agreement was signed by TDC, Pentrade. Westmoreland, and Angel. Pet. App. at 48. Hendrickx signed the Shareholders Agreement as the "Authorized Agent" for TDC, and Sadoux signed as the "Authorized Agent" for Pentrade. *Id.* The Shareholders Agreement was then amended in March 1997 to include an Addendum. Pet. App. at 49. The Addendum included an arbitration clause that provided

> the parties hereby agree to . . . binding international arbitration in Paris, France.

Pet. App. at 53.

Ultimately, Angel sold its interest to Pentrade and TDC, thereby leaving Westmoreland owning 7% of the shares of Aston, and Pentrade and TDC collectively owning 93%.

Pet. App. at 2. Sadoux and Hendrickx had total control over the day-to-day operations of Aston. *Id.* From the inception of the operation, Sadoux and Hendrickx made a number of misrepresentations to Westmoreland about the lack of success of Aston and specifically misrepresented that they had received no inquiries from prospective purchasers of Aston. Pet. App. at 13.

In reliance on those representations, Westmoreland accepted Defendants' offer to purchase Westmoreland's shares of Aston in July 1999 for $245,000. Pet. App. at 3. After Westmoreland sold his shares, he was shocked to learn in early 2000 that all of the representations made to him by Sadoux and Hendrickx about Aston were false. *Id.* In fact, within two months after Westmoreland sold his shares, Sadoux and Hendrickx concluded a sale of the company for $14 million to another company. *Id.* As soon as Westmoreland learned of these events, he sued Sadoux and Hendrickx in their individual capacities in state court for having made fraudulent misrepresentations to him upon which he relied in selling his shares for approximately 25% of their value established in the sale. *Id.*

Thereafter, Sadoux and Hendrickx removed the case to the United States District Court for the Southern District of Texas and filed, among other motions, a motion to compel arbitration. Pet. App. at 1. The District Court granted the motion to compel arbitration and stayed the proceedings. *Id.*

The District Court then certified that decision for an immediate, interlocutory appeal, and the Fifth Circuit also granted permission to present the issue on an interlocutory basis. Pet. App. at 3. On appeal, the Fifth Circuit agreed with Westmoreland and determined that because there was nothing

in the Shareholders Agreement that indicated the signatories' intention to allow their agents to compel arbitration and because Westmoreland was not relying on the terms of the Shareholders Agreement, Sadoux could not compel arbitration. Pet. App. at 7-9. The Fifth Circuit further recognized that Sadoux and Hendrickx were not parties to the Shareholders Agreement for obvious, advantageous reasons. Pet. App. at 8. Accordingly, the Fifth Circuit chose not to second-guess the parties' intentions as disclosed in the Shareholders Agreement. Pet. App. at 9.

REASONS FOR DENYING THE PETITION

Sadoux argues that this Court should grant *certiorari* because the Fifth Circuit failed to follow established precedent that an agent of the signatory to an arbitration agreement can compel arbitration. The Fifth Circuit did not, however, adopt the notion that an agent can never compel arbitration. Rather, the Fifth Circuit followed and applied the theories developed by other Circuits and its own precedent as to when a non-signatory can enforce arbitration. In doing so, the Fifth Circuit determined that the non-signatory, Sadoux, in this specific fact instance, could not compel arbitration under an agency theory or an equitable estoppel theory. Hence, there is no conflict among the Circuits in determining when a non-signatory can compel arbitration. As such, this Court should deny Sadoux's Petition.

The ability to compel another party to arbitrate generally depends on the existence of a contractual agreement to arbitrate between those parties. *Del E. Webb Constr. Co. v. Richardson Hosp. Auth.*, 823 F.2d 145, 149 (5th Cir. 1987). Before a court can compel arbitration under the Federal Arbitration Act, the court must determine if those parties

agreed to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985). When two parties voluntarily enter into an arbitration agreement, those parties must comply with the terms of the agreement. *Id.* Nothing in the Federal Arbitration Act allows unrelated parties to bring outside claims in arbitration. *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989) ("[W]e are unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes."); *see also Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993) (denying non-signatory's attempt to compel arbitration, because "the right to compel arbitration stems from a contractual right" that the non-signatory party does not have).

Therefore, "arbitration . . . is a matter of consent, not coercion." *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 270 (1995). Because the federal policy favoring arbitration only applies where parties have entered a valid contract for such arbitration, Sadoux's argument that there is a strong federal policy favoring arbitration here puts the cart before the horse. That policy does not even come into play until it is first determined that Westmoreland agreed to use some form of alternative dispute resolution to resolve his disputes asserted in this lawsuit. An arbitration clause is only liberally read when an arbitration agreement in fact exists. Here, the parties never agreed to submit this claim to arbitration.

Sadoux was not a party to the Shareholders Agreement. Thus, Westmoreland could not have expressly agreed to submit his dispute with Sadoux to arbitration. "Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that

the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Westmoreland never agreed to resolve this claim against Sadoux in an arbitral forum.

Courts have, however, recognized some limited circumstances in which non-signatories may be affected by the arbitration agreements of others. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d at 524, 526 (5th Cir.), *cert. denied*, 531 U.S. 1013 (2000); *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (recognizing incorporation by reference, assumption, agency, alter ego and estoppel). Yet, those theories, arising out of common law principles of contract and agency law, typically operate to bind a non-signatory to the arbitration agreement of a related signatory. The situation in this case presents the opposite scenario — a non-signatory (Sadoux) to the arbitration agreement seeks to bind a signatory (Westmoreland). In determining when to apply such theories, the courts have always looked to the contracting parties' intent.

In this case, there is no evidence or suggestion that the parties intended to include Westmoreland's fraud claim against Sadoux within the scope of the arbitration clause in the Shareholders Agreement. Westmoreland does not bring suit on the basis that Sadoux breached the Shareholders Agreement. To the contrary, Westmoreland seeks damages for fraudulent misrepresentations and conduct, which arose separate and apart from the Shareholders Agreement. By seeking relief against Sadoux in his individual capacity for a tort he committed individually, Westmoreland is not attempting to obtain any benefit or enforce any right that he has under the Shareholders Agreement against Sadoux's principal, Pentrade, a party to the Shareholders Agreement.

In fact, the Shareholders Agreement does not even contemplate providing relief for the commission of fraud by individual agents. Rather, Westmoreland is only seeking to hold Sadoux liable in his individual capacity for a tort he committed against Westmoreland. This tort exists without regard to the Shareholders Agreement. Accordingly, neither an agency theory nor an equitable estoppel theory provides justification for allowing Sadoux to compel arbitration.

I. Sadoux cannot compel Westmoreland to arbitrate under an agency theory because the contracting parties did not intend to bind their agents under the Shareholders Agreement

A non-signatory who is the agent of a party to a contract containing an arbitration clause may compel the other parties to the contract to arbitrate their claims against him for liability arising under the contract, but not other claims. *Britton v. Co-op Banking Group*, 4 F.3d 742, 748 (9th Cir. 1993). Sadoux bases his argument on the fact that Sadoux was an agent for Pentrade and the claims between Westmoreland and Sadoux were related to Sadoux's relationship with Pentrade. Sadoux's Petition at 19. Sadoux, however, ignores the critical distinction that Westmoreland is not suing Sadoux for something he did in a representative capacity for Pentrade; Westmoreland is suing Sadoux for something Sadoux did in his individual capacity. In this circumstance, principles of agency law do not subject the dispute to arbitration.

The First Circuit considered this exact question in the case of *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994). There, the plaintiff, McCarthy, sold his corporation to Azure's company pursuant to a purchase agreement that contained an arbitration provision. *Id.* at 353. The agreement "provided

that '[d]isputes arising under the Agreement shall be resolved by arbitration . . .'" *Id.* McCarthy and Azure's company also executed a confidentiality agreement that included a more expansive arbitration clause:

> Any controversy or claim *arising out of* or *relating to* this Agreement, or breach hereof, shall be settled by arbitration. . . .

Id. at 353-54 (emphasis added). Additionally, Azure's company executed an employment letter that engaged McCarthy as its president, chief engineer, and chief executive officer. *Id.* at 354. The letter, however, did not include an arbitration clause. *Id.* Approximately two weeks after the parties entered into these agreements, Azure terminated McCarthy's employment. *Id.* at 354. Thereafter, McCarthy sued Azure and his companies[1] for breach of the employment contract, wrongful discharge, fraud, negligent misrepresentation, intentional infliction of emotional distress, unfair trade practices, federal and state securities violations, and racketeering. *Id.* at 354 n.2. Azure and his companies then filed a motion to stay the proceedings pending arbitration, asserting that the agreements required arbitration. *Id.* at 354. The lower court granted the motion to arbitrate as to one of Azure's companies but denied the motion as to him individually. *Id.* Azure then appealed the court's order that refused to stay the action against him individually. *Id.*

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1. Azure merged the company that he bought from McCarthy with two of Azure's own companies. *Id.* at 353.

On appeal, the First Circuit held that McCarthy's individual claims against Azure were not subject to the arbitration agreement. *Id.* The court based its ruling on its finding that there was

> no overt indication that the parties intended to commit claims against [Azure], *as an individual*, to an arbitral forum. After all, [Azure] signed the Purchase Agreement solely in his capacity as an agent for a disclosed principal. . . . [I]t is settled beyond peradventure that a person signing a contract only in a corporate capacity, and unambiguously indicating that fact on the face of the contract documents, does not thereby become a party to the agreement.

Id. at 356 (emphasis added). The court noted that there are certain agency principles under which non-signatories can be bound by agreements signed by others, and cited many of the same cases cited by Sadoux. *Id.* The *McCarthy* court, however, rejected these principles as "comparing apples to oranges." *Id.* at 357. In each of the cases that gave a non-signatory the benefit of an arbitration clause, the courts found that the parties' intention was that the arbitration provision should cover the non-signatories. *Id.* Conversely, in *McCarthy*, the court found that the arbitration clause failed to indicate such a clear intention. The court ultimately held that

> [I]t is difficult to see how a lawsuit between the seller and a non-signatory who is not a successor in interest to the buyer's rights can be said to "aris[e] under" the Purchase Agreement. Thus, [Azure's] effort to compel [McCarthy] to arbitrate

> cannot succeed, for, "as a matter of contract, no party can be forced to arbitrate unless that party has entered an agreement to do so."

Id. at 359 (citation and footnote omitted).

As in *McCarthy*, nothing in this Record indicates that the parties intended to include Sadoux within the scope of the arbitration agreement. The Shareholders Agreement does not express or imply that Sadoux acted in his individual capacity when he signed it. On the contrary, Sadoux signed for Pentrade Limited as an "Authorized Agent," which is expressly stated under Sadoux's signature. Pet. App. at 48, 54. The evidence, taken as a whole, compels the conclusion that Sadoux was not a party to the Agreement and did not consent to arbitrate disputes as to his personal liability. Because Westmoreland is not suing Sadoux in any representative capacity for Pentrade, Sadoux should not now be able to enforce the arbitration provision in the Shareholders Agreement.

Sadoux attempts to cloud the holding in *McCarthy* by stating that it was decided on grounds other than the parties' intent. Sadoux's Petition at 17. *McCarthy* unequivocally held that an agent who is a non-signatory to an arbitration agreement for a corporation, which was a signatory to an arbitration agreement, cannot compel arbitration because the agreement did not show an intention for the non-signatory agent to be covered under the arbitration clause. 22 F.3d at 356. Intention of the parties must be present. Instead, Sadoux argues that he should be allowed to invoke arbitration because he was acting as the agent of Pentrade in making the fraudulent representations. Sadoux's Petition at 19. This conclusion ignores the basic tenants of contract and

agency law. It is well-settled under the principles of contract law that the question of interpreting an arbitration provision as to which parties are covered is answered by examining the contract so that the parties' intent may be ascertained. *McCarthy*, 22 F.3d at 357. There is no evidence of any intention to include their agents. Sadoux, in his individual capacity, committed an intentional tort against Westmoreland, and therefore, Westmoreland does not have to show that Sadoux, as a shareholder or agent for Pentrade, breached any duty owed under the Shareholders Agreement.

II. The decision of the Fifth Circuit does not create a conflict among the Circuits

Sadoux further suggests that the Fifth Circuit's opinion conflicts with the majority of Circuits' views of when an agent of a signatory can compel arbitration. Sadoux's Petition at 16. To support his argument, Sadoux asserts that the Fifth Circuit's opinion directly conflicts with the Third Circuit's opinion in *Pritzker v. Merrill Lynch*, 7 F.3d 1110 (3d Cir. 1993) and with the Sixth Circuit's opinion in *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990).[2] While the Fifth Circuit did criticize *Pritzker's* "sweeping holding," *Pritzker* is distinguishable in that *Pritzker* rested on the notion that the parties *intended* their agents to be covered by the arbitration provision. *Pritzker*, 7 F.3d at 1114-15. The First Circuit, in *McCarthy*, a decision in which the Fifth Circuit relied in this case, only distinguished *Pritzker* and illustrated that the agency theory has limitations, which are predicated on contract interpretation. 22 F.3d at 357.

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2. Sadoux also cites *Long v. Silver*, 248 F.3d 309 (4th Cir.), *cert. denied*, 534 U.S. 894 (2001) to support his agency argument and to support his contention that the Fifth Circuit opinion in this case went against the majority view. The holding in *Long*, however, was based on equitable estoppel determinations. 248 F.3d at 321.

In fact, the irony of Sadoux's argument is that *Pritzker* and *Arnold* both followed the case of *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185 (9th Cir. 1986) from the Ninth Circuit — the very circuit that issued the opinion of *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir. 1993), another case on which the Fifth Circuit relied. These cases were solely decided on specific fact questions of contract interpretation. Likewise, in this case, there is no evidence, in the Shareholders Agreement or otherwise, that the signatories intended that their agents should be allowed to invoke arbitration rights. Therefore, Sadoux is incorrect to suggest that the Fifth Circuit created some sort of split that would warrant review by this Court.

III. Sadoux cannot compel arbitration under an equitable estoppel theory because Westmoreland does not rely on the terms of the Shareholders Agreement in bringing his claims against Sadoux

Sadoux also argues that he should be able to compel arbitration through an equitable estoppel theory. He does not, however, show any reason as to why this issue is worthy of this Court granting *certiorari*. In making this contention, he relies on the Fifth Circuit's opinion in *Grigson v. Creative Artists Agency L.L.C.* In *Grigson*, the Fifth Circuit outlined the two different circumstances in which equitable estoppel allows a non-signatory to compel arbitration:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. . . . Second, an application of equitable estoppel is warranted when the signatory

> to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

Grigson, 210 F.3d at 527. Neither of these circumstances exist in this case. *Grigson* involved a tortuous interference with contract claim. *Id.* at 526. As indicated by the very title of the claim, liability was predicated on the existence and breach of the contract. *Id.* In this case, Westmoreland does not need the Shareholders Agreement to bring his claims against Sadoux as he is suing Sadoux for an independent tort.[3] Sadoux's position is so extreme that under his reasoning, any Pentrade agent could compel arbitration in response to any tort claim made against him by Westmoreland. Furthermore, Westmoreland does not claim that the signatory, Pentrade, has committed wrongdoing. Nevertheless, Sadoux argues that he was acting solely as Pentrade's agent and as such, is covered by the arbitration agreement. Sadoux's Petition at 19. Because Sadoux committed the tort and not Pentrade, Sadoux, in his individual capacity, must be liable. Westmoreland is not seeking to

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3. This same determination must be made when analyzing whether the scope of an arbitration clause encompasses a party's claims. For instance, the Fifth Circuit reasoned that a claim is not subject to arbitration if it can be maintained without reference to the agreement that contains the arbitration provision. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250 (5th Cir. 1998). Accordingly, even if, as a general matter, Sadoux could invoke the provisions of the arbitration agreement as a non-signatory, the Fifth Circuit's opinion should not be disturbed because Westmoreland does not need the Shareholders Agreement to bring his claims against Sadoux.

enforce any duty or remedy under the Shareholders Agreement, and there is nothing in the Shareholders Agreement to indicate that Sadoux should be allowed to compel arbitration. Accordingly, because Westmoreland's claims are sustainable without reference to the Shareholders Agreement, his claims do not fall within the arbitration provision's purview and an equitable estoppel theory cannot be applied.

CONCLUSION

The Fifth Circuit's opinion creates no conflict among the circuits. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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